Supreme Court, U.S.
AUG 3 1 2007
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NO. 07-8

IN THE
SUPREME COURT OF THE UNITED STATES

THE NATIONALIST MOVEMENT,
Petitioner

v.

CITY OF YORK,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER PETITIONER HAS PRESENTED COMPLELLING REASONS TO GRANT THE PETITION WHERE THE DECISION OF THE COURT OF APPEALS THAT A FEE MAY BE CHARGED FOR THE EXERCISE OF FREE-SPEECH AND ASSEMBLY AT A SEAT OF GOVERNMENT DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR A COURT OFAPPEALS?

2. WHETHER PETITIONERS PRESENT A COMPELLING REASON TO GRANT THE PETITION, WHERE THE THIRD CIRCUIT'S OPINION REGARDING THE CHARGING OF A FEE FOR THE EXERCISE OF FREE-SPEECH AND ASSEMBLY IN A TRADITIONAL PUBLIC FORUM DOES NOT PRESENT A QUESTION OF EXCEPTIONAL IMPORTANCE?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, the City of York, is a municipal corporation and a political subdivision of the Commonwealth of Pennsylvania. The City of York does not have a parent corporation and there is no stock held by a publicly held company.

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COUNTERSTATEMENT OF THE CASE

Plaintiff/Appellant, the Nationalist Movement initiated this civil action by filing a Complaint pursuant to 42 U.S.C. §1983, §1985 and §1988 for alleged violations of Plaintiff's First, Fifth and Fourteenth Amendment rights and for declaratory judgment pursuant to 28 U.S.C. §2201 and 2202. In the Complaint, Plaintiffs sought to conduct a rally, deliver speeches and circulate petitions on the steps of the York City Hall and to conduct a parade upon the streets adjoining City Hall on January 20, 2003.

Thereafter, Plaintiff/Appellant filed a Motion for a Temporary Restraining Order and Motion for Preliminary/Permanent Injunction seeking to enjoin the City of York from enforcing Article 741, Section 741.03 of the Codified Ordinances of the City of York with respect to the activities planned for January 20, 2003. A hearing on Plaintiff/Appellant's request for a temporary restraining order and/or injunctive relief was scheduled for January 13, 2003 at 1:30 p.m. Following several telephone conference calls among counsel and the Court on January 9 and January 10, 2003, the parties effectuated a settlement agreement of all of Plaintiff's claims, except the claim for attorney's fees and costs pursuant to 42 U.S.C. §1988.

By Order dated January 10, 2003, the District Court granted Defendant's/Appellee's concurred in Motion to Dismiss as moot Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction and cancelled the hearing schedule for January 13, 2003. In that Order, the District Court further noted that pursuant to the agreement of counsel, the City of York would provide police at Plaintiff/Appellant's planned activity; the City of York would not interfere with Plaintiff/Appellant's planned activities in the City of York on January 20, 2003; and that the City of York would provide electricity for the planned activities at City Hall on January 20, 2003 for a nominal fee of one ($1.00) dollar.

On May 5, 2003, Defendant/Appellee City of York filed a Motion to Enforce Settlement Agreement, or in the Alternative, a Motion to Dismiss as Moot Plaintiff's Complaint. By Order dated March 23, 2004, the District Court denied Defendant/Appellee's Motion to Enforce Settlement Agreement, or in the Alternative, Motion to Dismiss Complaint as Moot.

Thus, Plaintiff/Appellant was free to pursue its constitutional challenges to the City's Ordinance on its face and is applied to the Plaintiff/Appellant.

The parties then filed Cross-Motions for Summary Judgment on Plaintiff/Appellant's facial and as applied challenges to the City of York's Public Meetings Ordinance. By Memorandum and Order dated March 24, 2006, the District Court granted in part and denied in part Plaintiff/Appellant's Motion for Summary Judgment. The District Court granted Plaintiff's Motion for Summary Judgment as to Count 2 of the Complaint and declared that Section 741.03(d)(7) and (d)(9) were unconstitutional as written. In all other respects, Plaintiff/Appellant's Motion for Summary Judgment was denied.

In its March 24, 2006 Memorandum and Order, the District Court granted in part and denied in part Defendant/Appellee, City of York's Motion for Summary Judgment. Defendant/Appellee's Motion was granted with regard to: Plaintiff/Appellant's First Amendment challenges to all other aspects of the Ordinance; Plaintiff/Appellant's claims of denial of equal protection and due process; and Plaintiff/Appellant's challenge to the Ordinance as void for vagueness and overbroad. Accordingly, Counts 1, 3, 4, 5, 6, 7, 8 and 9 of the Complaint were dismissed. In all other respects, the District Court denied Defendant/Appellee's Motion for Summary Judgment.

The Nationalist Movement then filed a timely Notice of Appeal to the United States Court of Appeals for the Third Circuit. By Memorandum and Order dated March 21, 2007, the Third Circuit affirmed, in part, and reversed in part, the District Court's decision on the Cross-Motions for Summary Judgment. The Third Circuit struck down the reimbursement and indemnification provisions of the City's ordinance. The District Court's decision was affirmed in all other respects.

v.

COUNTERSTATEMENT OF THE FACTS

Steven M. Hovis, Esquire, is an attorney licensed to practice law within the Commonwealth of Pennsylvania. At all times relevant to Plaintiff's Complaint, Attorney Hovis has served as Assistant City Solicitor for the City of York. (Hovis Dec. ¶ 1) As Assistant City Solicitor, Attorney Hovis was requested to draft an Ordinance amending Article 741, § 741.03 "Public Meetings" of the Codified Ordinances of the City of York, Pennsylvania, to establish procedures for obtaining a permit to meet and gather in the parks of the City of York. (Hovis Dec. ¶ 2)

The object of the permit system was not to exclude communication of a particular content, but to coordinate multiple uses of limited space; to assure preservation of the park facilities; to prevent uses that are dangerous, unlawful or impermissible under the City's rules; to assure financial accountability for damage caused by a permitted event; and to address the enormous strain on the City's financial resources associated with police overtime and other costs incurred with respect to providing security at permitted events. (Hovis Dec. ¶ 3) In March, 2002, a unanimous United States Supreme Court upheld the permitting system adopted by the Chicago Park District. See, Thomas v. Chicago Park District, 534 U.S. 316, 332 (2002). (Hovis Dec. ¶ 4)

Prior to drafting the Ordinance for the City of York, Attorney Hovis obtained a copy of the permit system adopted by the Chicago Park District. Other than some minor technical changes, the City of York's Permit Ordinance is substantially similar to the park permitting ordinance which had passed Constitutional muster in the Thomas v. Chicago Park District case. (Hovis Dec. ¶ 5; Exhibit "1") On April 16, 2002, the Council of the City of York adopted Ordinance No. 10 amending Article 741, § 741.03 "Public Meetings" of the Codified Ordinances of the City of York, Pennsylvania, by providing for a procedure of obtaining a permit to meet and gather in the parks of the City of York. The Ordinance became effective upon the approval of Mayor Brenner on April 19, 2002. (Hovis Dec. ¶ 6; Exhibit "2")

At the time that he prepared Ordinance No. 10 of 2002, Attorney Hovis was unaware of the group known as the Nationalist Movement and/or

the views held by that group. (Hovis Dec. ¶ 8) Ordinance No. 10 of 2002 was adopted as a reasonable time, place and manner regulation of activities within the City of York and was not an attempt to exclude communication of any viewpoint, philosophy and/or comment.

The City of York's Ordinance imposed a deadline for processing a permit application (Section 741.03(e)(3)); required written notice of the grounds for denial (Section 741.03(e)(4)), enumerates the grounds upon which the City may deny the application (Section 741.03(e)(5)) and also provides procedures for review and appeals. (Hovis Dec. ¶ 9) On or about June 14, 2002, the Nationalist Movement submitted an application permit to hold a Henry Schaad Day and King holiday protest in and around York City Hall on January 20, 2003. (Hovis Dec. ¶ 10; Exhibit "3")

In its application, the Nationalist Movement objected to several of the provisions of the Ordinance, including those relating to security deposits, insurance coverage and indemnification agreements. The applicant's objection was predicated on refusal to pay for the security deposit, insurance coverage and not due to any claimed inability to pay for same. (Hovis Dec. ¶ 11) Section 741.03(f)(3) of the City of York's Ordinance provides that any requirement for a user fee, security deposits or certificate of insurance may be waived "if the activity is protected by the First Amendment of the United States Constitution and the requirement would be so financially burdensome that it would preclude the applicant from using park property for the proposed activity." (Hovis Dec. ¶ 12)

By correspondence dated July 12, 2002, Attorney Hovis notified Richard Barrett of the Nationalist Movement that the permit application was being denied as incomplete and for failure to comply with the requirements of the City's Ordinance. (Hovis Dec. ¶ 13; Exhibit "4") Neither the nature of the event nor the content of the event organizers' message was a motivating factor in my decision to deny the Permit Application. (Hovis Dec. ¶ 14)

On or about July 15, 2002, Mr. Barrett submitted an appeal letter from my decision denying the Permit Application. By correspondence dated July 25, 2002, James E. Gross, Director of Public Works for the City of York, affirmed the denial of the Permit Application for "Henry Schaad Day" based upon the deficiencies identified in my July 12, 2002 correspondence. (Hovis Dec. ¶ 15; Exhibit "5") Thereafter, Mr. Barrett asked the City Council to

exercise discretion by entertaining a further appeal, but there was no duty on the part of City Council to entertain such an appeal under the Ordinance, and Council declined to do so. (Hovis Dec. ¶ 16)

On August 19, 2003, the Council of the City of York enacted Ordinance No. 33 of 2003 amending the Public Meetings Ordinance. That amendment deleted § 741.03(c)(1)(b) [which dealt with circulation or distribution of any handbills, notices, pamphlets, books, documents or papers] and § 741.03(c)(1)(j) [which dealt with the display, posting or distribution of any placard, handbill, pamphlet, circular, book or other writing] in their entirety. (Hovis Dec. ¶ 17; Exhibit "6")

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with the decision of this Court or any Court of Appeals, nor do they implicate a federal questions that has not been decided by this Court. Accordingly, Petitioner has not carried its burden of demonstrating any "compelling reasons" for the Petition to be granted. See, Sup. CT. R.10.

A. The District Court properly granted summary judgment in favor of the City of York on Plaintiff's facial and as applied challenges to all provisions of the City of York Public Meetings Ordinance except for Section 741.03 (d)(7) and (d)(9)

The First Amendment protects speech and other expressive activity in public places or "government fora", and the degree of protection depends upon the type of forum at issue. See, Kreimer v. Borough of Police, 958 F.2d 1242, 1255-1256 (3rd Cir. 1992). The Supreme Court has identified three (3) types of fora. See, Arkansas Education Television Commission v. Forbes, 523 U.S. 666, 677 (1998). First, there are traditional public fora, the streets, parks and public sidewalks are all considered as places for public assembly and the communications of ideas. Kreimer, 958 F.2d at 1261. Second, there are designated public fora, areas the government has specified for First Amendment activities. Id. Third, there are non-public fora, places "which are not 'by tradition or designation [fora] for public communication' and are the governmental equivalent of private property." Id. at 1256.

For traditional fora and designated fora, regulation of First Amendment activity is Constitutional if three (3) conditions are met. First, the regulation must be content-neutral that is "justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Secondly, it must be "narrowly tailored to serve a significant governmental interest." Id. Third, it must "leave open ample alternative channels for communication of the information." Id.

In March, 2002, a unanimous United States Supreme Court upheld the permitting system adopted by the Chicago Park District. See, Thomas v.

Chicago Park District, 534 U.S. 316, 332 (2002). (Hovis Dec. ¶ 4) Prior to drafting the Ordinance for the City of York, Attorney Hovis obtained a copy of the permit system adopted by the Chicago Park District. Other than some minor technical changes, the City of York's Permit Ordinance is substantially similar to the park permitting ordinance which had passed Constitutional muster in the Thomas v. Chicago Park District case. (Hovis Dec. ¶ 5; Exhibit "1")

The Supreme Court has found that the government has a substantial interest in "coordinating multiple uses of limited space" which implicates a permittee's interest in the use and enjoyment of that space. Thomas v. Chicago Park District, 534 U.S. 316, 332 (2002). In Thomas, the Chicago Park District adopted an ordinance which required a person to obtain a permit in order to "conduct a public assembly, parade, picnic or other event involving more than 50 individuals," or engage in an activity such as creating or emitting any amplified sound." Id. at 318. The permit statute in Thomas is substantially similar to the City of York ordinance at issue in this litigation, as were the thirteen (13) specified grounds for rejection of a permit under the Chicago Park District ordinance. See, Thomas, 534 U.S. at 318-319 n. 1. The Court noted that the "object of the permit system, as plainly indicated by the permissible grounds for permit denial is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful or impermissible under the park district's rules, and to assure financial accountability for damage caused by the event." Id. at 322.

In assessing the appropriateness of the permitting scheme as a time, place and manner regulation, the Supreme Court noted that "even content-neutral time, place and manner restrictions can be applied in such a manner as to stifle free expression" where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit. Thomas, 534 U.S. at 323 (citing Forsyth County v. Nationalist Movement, 505 U.S. 123, 131 (1992)). Thus, the regulation in question must contain adequate standards to guide the official's decision and render it subject to effective judicial review. Id.

In the District Court proceedings and again on appeal, Petitioner challenged the permit fee provisions of the York Ordinance. In its March 24, 2006 Memorandum and Opinion, the District Court noted that the York

officials have no discretion with regard to the permit fee and that the nominal fee for a basic permit is set based upon the City facility being utilized and whether the applicant is a City resident or non-resident. It is also important to note that the City must waive the permit fee upon a showing that the fee would "be so financially burdensome that it would preclude the applicant from using park property for the proposed activity." The waiver provision of the Ordinance is mandatory once the applicant provides objective evidence of an inability to pay.

In granting summary judgment on Plaintiff's First Amendment claim, the District Court noted that because the nominal user fee leaves no discretion to the official, does not base the amount charged on the content of the message, is narrowly tailored to allow the City to only to recover the incidental costs of processing the application, and makes provisions for groups unable to pay, the user fee does not facially violate the First Amendment.

On appeal, the Third Circuit distinguished Forsyth County v. Nationalist Movement, 505 U.S. 123, 130, (1992) in that the statute allowed a variable fee up to $1,000.00 per day; there were no standards directing the setting of the fee; and the fee was, in part, based on the content of the speech. The Third Circuit noted that the York City Ordinance did not contain any discretionary component involving the setting of the application fee; absent a waiver, the fee was applied across the board to all perspective users; and the fee was nominal and narrowly tailored to allow the City to recoup the cost of processing the application. Consequently, the Third Circuit properly concluded that the application fee did not violate the First Amendment.

Petitioner also challenges the $50/$100 application fee as a violation of the Equal Protection Clause. While the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike, in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985), the Supreme Court has clarified that "equal protection does not require that all persons speak out with identically, but it does require that a distinction made have some relevance to the purposes for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 111 (1966). Further, the "Equal Protection Clause" requires that statutes affecting First Amendment interests be "narrowly tailored to their legitimate objectives."

Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 101 (1972).

In dismissing Petitioner's equal protection challenges to the permit fee, the District Court found that said claim was functionally identical to Plaintiff's First Amendment challenge. See, Hill v. City of Scranton, 411 F.3d 118, 126 (3d Cir. 2005). As noted above, the District Court found that the permit fee scheme did not violate the First Amendment on its face, nor was there any evidence that it was applied against the Petitioner in a discriminatory fashion. The District Court also noted that the de minimus reduction in the fee for city residence further the legitimate government purpose of encouraging city residence to hold events locally within the City. Since the City residents already fund the York Recreational Department through the taxes they pay, this de minimus reduction in the user fee does not offend the Equal Protection Clause.

On appeal, the Third Circuit noted this Honorable Court has upheld residency requirements, such as this under a rational basis test, where, as here, there was no contention that fundamental rights were at issue. See, e.g. Martinez v. Bynum, 461 U.S. 321, 328-39 (1983) (school residency requirement); Baldwin v. Fish and Game Commission of Montana, 436U.S. 371, 388-92 (1978) (hunting permit for sport). The Third Circuit properly concluded that Petitioner has not shown that the rational basis test does not apply to this content–neutral minimal application fee, much less that, under that test, the differential does not pass muster. Consequently, Petitioner has not presented any compelling reason to grant the Petition for a Writ of Certiorari.

With respect to Petitioner's "as applied" challenge to the ordinance, it is important to note that Petitioner was allowed to conduct its event in the City of York on January 20, 2003. Moreover, Petitioner was not required to obtain a permit or otherwise comply with the provisions of the City of York's ordinance. In short, Petitioner was afforded an opportunity to conduct its rally, make its speeches, distribute its literature and otherwise proceed as planned with its Henry Schaad Day/King Holiday protest. Under the circumstances, it strains credulity to suggest that the Ordinance has been applied against Petitioner in an unconstitutional manner.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

Lavery, Faherty, Young & Patterson, P.C.

By: /s/ James D. Young

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DATE: August 31, 2007

PROOF OF SERVICE

The undersigned counsel hereby verifies that on the below listed date he personally caused to be served upon the following two true and correct copies of the Brief of Respondent, City of York, by mailing same, via first class mail, postage pre-paid, as follows:

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